In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1687

EAST TEXAS STEEL CASTINGS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 457 F. 2d 879. The Board's decision and order (Pet. App. Exhibit B) are reported at 191 NLRB No. 28.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1972 (Pet. App. A2), and the company's petition for rehearing was denied on May 18, 1972 (Pet. App. A3). The petition for a writ of certiorari was filed on June 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company refused to sign an agreement previously reached with the certified representative of its employees, thereby violating Section 8(a)(5) and 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3. Section 8(a)(5) is also relevant, and provides:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. The Board's Findings of Fact

On May 2, 1969, the Union [1] was certified by the Board as the bargaining representative of the Company's employees (A. 79-80; 106, 121; 67).[2] The parties were unable to reach a collective bargaining agreement, however, and as a result the employees struck on July 28, 1969 (A. 107, 121; 10, 51, 53-54). The strike ended on January 10, 1970, when the employees voted to accept the Company's last offer (A. 108; 84). After being advised of the vote, Company spokesman J. D. McLaughlin informed the Union that he would "put to-

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[1] International Molders and Allied Workers Union, Local 58, AFL-CIO.

[2] "A." refers to the appendix to the briefs in the court below.

gether the agreements and understandings reached during the negotiations" and submit it to the Union (A. 85-86; 121).

During the ensuing correspondence between the Company and Union it developed that there was a misunderstanding concerning the duration of the agreement. The Union believed that the parties had agreed to a one-year contract term, but the Company insisted that they had agreed to a three-year term. Thereafter, on February 12, with the duration issue still unsettled, McLaughlin mailed the proposed contract and a covering letter to the Union, stating in the letter that "we will be glad to meet with you and sign the enclosed contract, or it can be handled by mail" (A. 121, 109; 89).

On April 11, the parties met again in an unsuccessful attempt to resolve their differences over the contract term (A. 121; 30). In a letter to the Union dated April 25, McLaughlin reiterated that the Company was not interested in signing a one-year contract but hoped the Union would "sign the three year agreement with us." (A. 97-98; 121-122).

On May 14, the International Union sent a telegram to McLaughlin stating that "on behalf of Local 358 [sic] [it] unconditionally accepts terms of contract proposed by the Company for a three year period commencing immediately" (A. 94; 110). On May 21, McLaughlin replied that, since the Company's "new owners" never had an opportunity to review the agreement, it was being sent to them for "review and advice" (A. 95; 122). In addition, the letter raised for the first time the Company's doubts as to the Union's

majority status and questioned the propriety of entering into a contract with the Union (A. 95; 122).

On May 26, two weeks after the Union had notified the Company of its unconditional acceptance of the contract, the Union sent a registered letter to McLaughlin offering to meet with him to execute the agreement (A. 96; 17; 110). The letter was returned a week later, acceptance having been refused because there was twenty cents postage due (A. 110-111; 17-18). One week later, the same letter was sent to McLaughlin's office by regular mail in an unmarked envelope, without a return address. McLaughlin did not receive this letter. (A. 111; 18, 70.) [2]

B. The Decisions Below

The Board concluded that the Company violated Sections 8(a)(5) and 8(a)(1) of the Act by refusing to sign an agreement previously reached with the certified representative of its employees (A. 123-124). The Board found that, despite the Union's unsuccessful effort to make a formal request for signing through the mail, "at all times material the Respondent had been duly notified of the Union's insistence upon execution of the contract" (A. 123). Accordingly, the Board ordered the Company to execute, deliver, and give effect to the contract between it and the Union (A. 124).

The court of appeals, in a *per curiam* decision, enforced the Board's order. It stated "[w]e find ample

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[2] The trial examiner concluded that, while a contract had been made on May 14, the Union had not "effectively requested [the Company] to sign" (A. 114). Accordingly he found that the Company had not violated Sections 8(a)(5) or (1) of the Act.

support in the record for the conclusion that the employer refused to sign an agreement with the certified bargaining representative of the employees although agreement was reached as to the terms and the employer was requested to sign" (Pet. App. A1).

ARGUMENT

1. The record in this case does not present the first question stated in the petition (Pet. 2)—whether "an employer is bound to sign a labor agreement where a good faith doubt exists concerning Union majority representation before an agreement is reached and more than one year has elapsed since certification." For the Board found, and the court of appeals sustained its finding, that the Company did not challenge the Union's majority status until May 21, seven days after the Union sent its telegram of acceptance and the contract between the parties was made (A. 122).[4] The Board

[4] The Company's contention (Pet. 7) that it notified the Union on May 12 of its claim of loss of majority is apparently based on reference to a May 12 letter contained in its letter of August 21 (A. 99). The Trial Examiner implicitly discredited that evidence in finding that there was no communication between the parties from April 21 to May 14 (A. 109-110). Moreover, even if timely, the Company's claim of loss of majority was predicated solely upon the amount of employee turnover. However, it is well settled that "[o]f itself turnover is no evidence of loss of majority status by the Union." *National Labor Relations Board* v. *John S. Swift Company*, 302 F. 2d 342, 345 (C.A. 7); *National Labor Relations Board* v. *Frick Company*, 423 F. 2d 1327, 1330-1332 (C.A. 3); *National Labor Relations Board* v. *Little Rock Downtowner, Inc.*, 414 F. 2d 1084, 1091 (C.A. 8); *National Labor Relations Board* v. *Rish Equipment Company*, 407 F. 2d 1098, 1100-1101 (C.A. 4); *Celanese Corp. of America*, 95 NLRB 664, 673.

concluded that the Company's May 21 letter asserted "nonmeritorious legal grounds for its refusal to sign" (A. 123). Accordingly, the only issue actually presented is whether the Board's finding that the Company lacked a good faith doubt regarding the Union's majority status is supported by substantial evidence. Such a factual question does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, the evidence amply supports the Board's finding (*supra,* pp. 2-4, A. 122-123).[5]

2. Similarly, the second question raised in the petition is not presented by the record in this case (Pet. 3) —whether "an employer violates the National Labor Relations Act by failing to sign an agreement when no demand is made on it for signature." For the Board found that "continuously since May 14, 1970, [the Union] was insisting upon execution of the agreement and that the Respondent, fully aware of the Union's position, was seeking its abrogation" (A. 123). The court of appeals held that this finding was supported by substantial evidence (Pet. App. A1). This factual issue likewise does not warrant further review.

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[5] There is no substance to petitioner's contention (Pet. 5-6) that the court of appeals ignored this question. The court specifically ruled that "[a]ll other contentions of the employer have been considered and are without merit" (Pet. App. A1).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1972.

☆ U.S. Government Printing Office: 1972—473-101/50